IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA.

RFA. NO.295 OF 1997.

Judgment Reserved on: 17.4.2007

Date of Decision: 21.5.2007

State of H.P. & another

……Petitioners

Versus

Gajinder Singh Katoch …… Respondent.

Coram

The Hon'ble Mr. Justice Kuldip Singh,Judge

Whether approved for reporting? No

For the Petitioners: Mr.Vijay Thakur, Dy. Advocate General.

For the respondents : Mr. J.S. Bhogal, Sr. Advocate with
Mr. Suneet Goel, Advocate.

Kuldip Singh, J

The defendants are in appeal against the judgment and decree dated 31.3.1997 passed by learned District Judge, Kangra at Dharamshala in Civil Suit No.21-N-I1995 (1992) decreeing the suit of the plaintiff and declaring that the compensation determined and imposed by the defendant No.2 vide letter dated 3.8.92 in respect of agreement No.14 of 1991-92 is illegal, void, without jurisdiction and not binding upon the plaintiff, the defendants are restrained from giving any effect to the order of defendant No.2 dated 3.8.92 and from effecting any recovery or adjustment of the amount of compensation, from out of the amounts, payable, if any, to the plaintiff or which may become payable

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whether reporters of Local Papers may be allowed to see the Judgment? yes

to him in respect of. the works executed by him. The parties for convenience sake are referred in this judgment in the same manner as referred in the impugned judgment.

The brief facts of the case are that on 30.5.1991, plaintiff had submitted a tender in the office of defendant No.2 in pursuance to a notice inviting tender for the execution of work of construction of Bridge over **Chhouch Khad on Mohtli Indora road** alignment No.1 km 3/690 (SH: c/o RCC slab bridge of 12 spans of 10.37meters each c/c of bearing)total span 127.74 meters c/c bearing on abutments. The tender of the plaintiff was accepted vide letter dated 21.8.1991. An agreement was executed between the parties as agreement No.14 of 1991-92. According to the agreement the plaintiff was required to complete the work within a period of two years which was to be reckoned from the 15th day of the award of work . The work was required to be commenced by 5.9.1991 and required to be completed on or before 4.9.1993 . The stipulated time in the agreement was essence of the contract, but the agreement also contained provisions for the extension of time in the event of the plaintiff was hindered in the execution for reasons beyond his control . The agreement contained clauses relating to the manner in which the work was to be executed. The plaintiff was required to execute the work with cement and steel stipulated to be issued to him in accordance with the ***Clause-10*** and in accordance with the designs, drawing & instructions issued to the plaintiff by defendant No.2. as per ***Clause- 11***. The plaintiff was also entitled to regular monthly payments for all the works done by a fixed

date of every month. The agreement also had a provision for compensation for each day of delay in the event of the work being delayed .

The defendants failed to honour their commitments under the agreement. The designs and drawings for the work were requested to be supplied to the plaintiff vide letter dated 30.8.1991 but the same were supplied to him on 17.1.1992. The cement and steel was not supplied to the plaintiff in time despite requests. The cement was supplied in quantities much less then the requirement . On account of defaults committed by the defendants, the plaintiff was prevented from achieving the stipulated progress and upto 13.7.1992 the value of the work done by the plaintiff comes to slightly more than 10% of the total cost against the 30% progress required upto that date.

On 15.7.1992 the defendant No.2 issued notice to the plaintiff showing his intention to impose compensation for alleged delay in the execution of the work which was replied by the plaintiff vide letter dated 24.7.1992. The delay in the execution of the work was not at all attributable to the plaintiff. The defendant No.2 unauthorizedly proceeded to determine and impose the compensation for alleged delay in the execution of the work and vide letter dated 3.8.1992 the defendant No.2 determined an amount of Rs.3,23,236/- as compensation payable by the plaintiff for alleged delay in the work. This was despite the fact that the plaintiff has not been paid a single paisa for the work done by him upto that date which amounted to more than three lakh rupees. The defendants were themselves responsible for delaying the work.

The defendant No.2 determined the compensation without jurisdiction, and determination of compensation is illegal and void.

The Superintending Engineer, 9th Circle HP PWD, Nurpur has evidently given his consent and approval for the compensation. The Superintending Engineer has thus rendered himself incapable of deciding any representation of the plaintiff in view of his having pre-judged the matter without having heard the plaintiff and simply on the report of the defendant No.2, who being a party to the dispute could not have given an impartial report which would have put the blame on his office. The defendants have not suffered any loss on account of alleged delay in the execution of work. The plaintiff vide letter dated 24.7.1992 offered to complete the work within the time stipulated i.e. 4.9.1993 provided he was given necessary materials and payments in time. On these facts the plaintiff filed the suit for declaration and injunction.

The defendants filed written statement wherein they have taken several preliminary objections. It has been alleged that suit is not maintainable and the same is misconceived. According to defendants as per clause-2 of the agreement the Superintending Engineer is the final authority to impose penalty for causing delay in execution of work . The penalty was imposed by the Engineer-in-charge and the same was finally approved by the Superintending Engineer.

On merits, it has been stated that the plaintiff was required to complete the work within a period of two years which was to be reckoned from the 15th day after the issue of the award letter . The department was required to supply the designs, drawings and instructions required for the execution of the work and also to provide the plaintiff with the cement and steel. The plaintiff was required to submit a monthly bill for the works executed by him. The progress of

the work was very slow and the plaintiff could get only one payment in one year. The necessary designs, drawings, and instructions and materials were issued to the plaintiff as and when required at the site. The plaintiff had completed only 10% of the whole work upto 13.7.1992 whereas he was required to complete the 45% of total work upto 2.8.1992. The department vide letter dated 15.7.1992 gave notice to the plaintiff to expedite the progress of work by putting sufficient labour and machinery but the plaintiff failed to do so and ultimately the department was constrained to levy compensation equal to 10% of the total amount of the agreement under clause-2, amounting to Rs.3,23,236/- vide letter dated 3..8.1992. The compensation was levied only after obtaining the prior approval of the Superintending Engineer as per the agreement. In brief the defendant prayed for dismissal of the suit.

The learned District Judge while deciding issue No.1 has held that compensation levied by defendant No.2 under Clause 2 of the agreement, is illegal, void and without jurisdiction and therefore, under issue No.2 the plaintiff is entitled for decree of declaration and injunction, Issue No.3 was not pressed by the defendants. The District Judge ultimately decreed the suit as noticed above.

I have heard the learned counsel for the parties and have also gone through the record.

The learned Dy. Advocate General has submitted that the trial Court has wrongly interpreted the Clause-2 of the agreement. The ***Vishwanath Sood case reported in AIR 1989 Supreme Court 952*** has not been properly appreciated. The trial Court has drawn wrong conclusion from the evidence. The Executive Engineer after obtaining approval of Superintending Engineer has rightly imposed the penalty

on the Contractor vide letter dated 3.8.1992. The trial Court has wrongly held that plaintiff was not at fault for causing delay in execution of works. It has been wrongly held that delay for execution of the work is attributable to the department. The trial Court has wrongly held that the material was not supplied to plaintiff in time. The plaintiff had not even consumed the material supplied to him, therefore, there was no justification for supplying more material such as cement and steel without consumption of earlier material supplied to him. The learned Dy. Advocate General prayed for setting aside the impugned judgment and decree.

Shri J.S. Bhogal, learned senior counsel has supported the impugned judgment and decree.

The agreement Ex.PW-2/A governs the terms and conditions for execution of the work. The ***Clause-2*** of the agreement is reproduced as follows:-

> "***The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be the essence of the contract on the part of the contractor and shall be reckoned from the fifteenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contactor shall pay as compensation an amount equal to one percent, or such smaller amounts as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the tendered amount of the whole work as shown in the tender, for very day that the work remains uncommenced or unfinished, after the proper dates. And further, to ensure good***

progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month (save for special jobs to complete one eighth of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed, three eighth of the work before one-half of such time has elapsed, and three-fourth of the work before three-fourth of such time has elapsed. However, for special jobs in time-schedule has been submitted by the contractor and the same has been accepted by Engineer-in-charge, the contactor, shall comply with the said time schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one percents or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the said tendered cost of the whole work for every day that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten percent, on the tendered amount of the work as shown in the tender".

The clause 3 authorizes the Engineer-in-charge to determine the contract, extension of time is provided in clause 4. The procedure of payments to contractor is provided in clauses 8 to 9A, clause 10 relates to store supply to him by the Govt. and in clause II the contractor is to comply exactly, fully and faithfully to the designs, drawings and instructions in writing given by Engineer-in-charge.

PW-1 Nardev Singh Store Munshi, Indora Sub Division has deposed that for 6 ½ months the department did not have any stock

of cement to be supplied to the contractor. For the first time steel against this contact was supplied to the plaintiff in March, 1992. Thereafter till August, 1992 no further steel was supplied to the plaintiff. He has proved Ex.PW-1/A, photocopy of Bin card.

PW-2 Jagdish Chand Dhiman Executive Engineer has proved agreement dated 21.8.1991, Ex.PW-2/A executed between the parties. He has proved letters of plaintiff dated 12.12.1991 Ex.PW-2/C, 17.2.1992 Ex.PW-2/E, 26.2.1992 Ex.PW-2/F, 20.4.1992 Ex.PW-2/ G, 25.4.1992 Ex.PW-2/H, 24.7.1992 Ex.PW-2/K, and letter dated 3.8.1992 Ex.PW-2/L of Executive Engineer to the plaintiff.

The plaintiff himself appeared as PW-3 and has admitted the agreement Ex.PW-2/A entered between the parties. He has deposed that he demanded copy of agreement and drawings from Executive Engineer, vide his letter Ex.PW-3/A. He informed the progress of the work to the Executive Engineer vide letter Ex.PW-2/C. He has demanded 1000 bags of cement and 10 metric tone steel vide letter Ex.PW-3/B dated 9.1.1992. He demanded 1000 bags of cement vide letter Ex.PW-2/E. He had written letter dated 26.2.1992 Ex.PW-2/F for inspection that his two suction pipes for dewatering were buried under the debris. He had written letters Ex.PW-2/G and Ex.PW-2/H. He demanded 1500 bags of cement vide Ex.PW-2/N but he was supplied 445 bags of cement against the approval of 500 bags. On 24.7.1992 he had written letter Ex.PW-2/K(Ex..PW/K) informing the Executive Engineer that delay has not been caused on his part. He demanded drawings vide Ex.PW-3/C. He requested for handing over the site vide Ex.PW-3/D. The site was handed over to him after one month. The Executive Engineer vide Ex.PW-2/L dated 3.8.1992 imposed a penalty of Rs.3,23,236/-. The department did not supply building

material to him despite his repeated request. On 23.4.1992 the department has supplied him 800 bags cement against demand of 1000 bags that too in parts. This material was consumed in the construction till 23.4.1992. and on that date he had left only 34 bags of cement. The daily consumption of cement was more than 50 to 113 bags, the left out 34 bags were not sufficient to meet the requirement. He was supplied only 1045 bags of cement by the department till 13.7.1991 and , on that date only 69 bags were left when heavy rains started. The entire building material collected at the sit was washed away due to floods and the pits were filled by debris and water over which he had no control and the work was to be stopped for no fault on him. The Executive Engineer issued notice to him and wrongly imposed the penalty though he has given the reply vide letter Ex.PW-2/K. According to him, Executive Engineer was not empowered to imposed penalty on him. An amount of Rs.3,00,000/- was due to him from the department on account of work carried out by him but department did not pay any amount to him.

In cross-examination he has stated that digging of the foundation of abutment was started on 20.9.1991 by him the day the site was handed over to him. He had engaged R.C. Mahajan a qualified engineer for supervision of work.. He received 4.60 metric tones steel on 6.4.1992 instead of 10 metric tones steel demanded by him. He has been paid Rs.50,000/- on 19.11.1992 after delay of 15 months.

DW-1 Lalit, Assistant Engineer has deposed that the site was inspected on 27.2.1992 by Superintending Engineer, Executive Engineer, and Assistant Engineer in presence of plaintiff and the plaintiff was given a programme to complete the work vide Ex. DW-

1/A. The site was again inspected on 21.4.1992 and a note to this effect is Ex.DW-1/B. The site was inspected again on 20.6.1992 and a note of said inspection is Ex.DW-1/C. The inspection was carried out again on 23. 6.1992 and a copy of note of such inspection is Ex.DW-1/D. In cross examination he has admitted that Ex.PW-3/L letter was addressed to Executive Engineer. Similarly he has also admitted the receipt of letters, Ex.PW-3/M, and Ex.PW-3/R. He has admitted that Ex.DW-1/A to Ex.DW-1/D were not prepared by him. He has also admitted that record pertaining to the notes Ex.DW-1/A to Ex.DW-1/D was not been seen by him.

DW-2 R.C. Sharma, Junior Engineer has stated that programme of construction was written by Superintending Engineer on 27.2.1992 in his presence and a photocopy thereof is Ex.DW-1/A, similarly he has stated about Ex.PW-2/C and Ex.PW-2/D. According to him excavation work was completed on 6.4.1992 and the concreting was started on that date. As per record the plaintiff was supplied 1845 cement bags from March to July 1992. The plaintiff was issued steel 4.6 metric tones (46 Qntls.) steel which he lifted on 8..4.1992. The plaintiff had consumed 0.767metric tons steel (7.67 Qntls). He could not complete 10% of the work upto 23.6.1992 In cross-examination he has admitted that Ex.DW-1/B, Ex.DW-1/C do not bear his signatures. He has admitted that on Ex.PW-3/D is written by plaintiff to Assistant Engineer requesting him to hand over the site. He has admitted that there was delay of one month from the date of execution of the contract till the date of handing over the site i.e. 20.9.1991 which occurred due to rain. He has admitted that on 23.4.1992 only 34 bags of cement were left with the plaintiff and on 13.7.1992 only 69 cement bags were left with the plaintiff. He has

admitted that Ex.PW-3/M was written by plaintiff to Executive Engineer.

DW-3 Lakhbir Singh Executive Engineer has stated that he was posted Executive Engineer in Fatehpur in 1995. The plaintiff has not completed the bridge in question. On 20..5.1996 the agreement was cancelled vide Ex.DW-3/A. The work was to be completed in two years. In cross-examination he has admitted that at the time of execution of the contract, starting of the work he was not posted at Fatehpur Division. He has shown his ignorance that a sum of Rs.3,00,000/- is due to the plaintiff from the department for the work he has executed. The drawings were supplied to plaintiff on 17.1.1992. He has admitted that first payment was made to the plaintiff after about 16 months from the commencement of the work i.e. 5.9.1991. He has stated that Executive Engineer is competent to impose the penalty after approval from Superintending Engineer. He has denied that Superintending Engineer is authorised to impose the compensation. This is the evidence which has been led by the parties.

DW-3 Lakhbir Singh has admitted that work was started by the plaintiff on 5.9.1991. He has further admitted that drawings were supplied to the contractor on 17.1.1992 .PW-1 Nardev Singh has stated that in February, 1992 there was no stock of cement in the store. He has also stated that for the first time steel against this contract was supplied to the plaintiff in March 1992 and thereafter till August 1992 no steel was supplied to the plaintiff. The plaintiff vide Ex.PW-2/C has informed the Executive Engineer that excavation of abutment towards Mohtli is almost complete and the excavation of Ist and 2nd pier are near completion and therefore, he requested for

approval for using water borne aggregate. This approval was conveyed to him after a gap of about 40 days vide letter dated 21.1.1992 Ex.PW-2/D. The plaintiff requested for supply of 1000 bags of cement vide Ex.PW2/E on 17.2.1992. He has also requested for supply of 500 cement bags vide Ex.PW-2/G on 20.4.1992. He has also requested for release of payment of his bills vide Ex.PW-2/K dated 24.7.1992. The Executive Engineer issued notice dated 15.7.1992 Ex.PW-3/Q to the plaintiff. He was advised to expedite the work, failing which action under clause-2 will be taken. This notice was responded by the plaintiff vide Ex.PW-3/R (Ex.PW-2/K) dated 24.7.1992. The plaintiff denied the notice dated 15.7.1992. In fact the perusal of Ex.PW-3/Q would show that the plaintiff was advised to expedite the work failing which action will be taken under different clauses of the agreement. However, instead of issuing a specific notice for levy compensation under clause-2 of the agreement the plaintiff vide Ex.PW-2/L was informed that an amount of Rs.3,23,236/- compensation has been imposed under clause -2 of the agreement. The plaintiff had replied the notice dated 15.7.1992 vide reply Ex.PW-3/R (Ex.PW-2/K) dated 24.7.1992 but in Ex.PW-2/L the reply Ex.PW-3/R (Ex.PW-2/K) has not been noticed nor it has been considered. It appears the compensation amounting to Rs.3,23,236/- has been imposed mechanically. As per clause-2 the maximum amount of compensation equal to 10% of the total amount of agreement is leviable. No reason has been assigned in the letter Ex.PW-2/L as to why the compensation upto maximum limit 10% has been imposed. In ***Vishwanath Sood v. Union of India and another AIR 1989 Supreme Court 952,*** the Hon'ble Supreme Court has held as follows:-

"***Secondly, while the clause fixes the rate of compensation at 1 percent for every day of default it takes care to prescribe the maximum compensation of 10 percent on this ground and it also provides for discretion to the Superintending Engineer to reduce the rate of penalty from 1 percent. Though the clause does not specifically say so, it is clear that any moderation that may be done by the Superintending Engineer would depend upon the circumstances, the nature and period of default and the degree of negligence of default that could be attributed to the contractor. This means that the Superintending Engineer, in determining the rate of compensation chargeable, will have to go into all the aspects and determine whether there is any negligence on the part of the contractor or not. Where there has been no negligence on the part of the contractor or where on account of various extraneous circumstances referred to by the Division Bench such as vis major or default on the part of the Government or some other unexpected circumstances which does not justly penalizing the contractor, the Superintending Engineer will be entitled and bound to reduce or even waive the compensation***"

The defendants have taken the stand that compensation under clause-2 has been imposed by Engineer-in-charge after obtaining approval from Superintending Engineer. There is nothing on record to show that such approval was taken but assuming that such approval in fact was taken in that case also before approval of compensation, the Superintending Engineer has not taken any considered view in as much as from Ex.PW-2/L dated 3.8.1992 it is clear that the stand of the plaintiff and even his reply dated

24.7.1992 Ex.PW-2/K(Ex.PW-3/R) has not been considered by Superintending Engineer. The Hon'ble Supreme Court in ***Vishwanath Sood case (supra)*** has further held ***:-***

> ***"But it will be apppeciacted that in practice the amount of compensation will be initially levied by the Engineer-in-charge and the Superintending Engineer comes into the picture only as some sort of revisional or appellate authority to whom the contractor appeals for redress".***

In other words under clause-2 the Engineer-in-charge would move the case for imposition of compensation but ultimately decision will be taken by the Superintending Engineer. The Superintending Engineer is required to impose the compensation under clause -2 objectively, but in the present case this has not been proved. In ***Vishwanath Sood*** case (supra) the Hon'ble Supreme Court has further held:-

> ***"As we see, it, clause-2 contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed to between the parties. The decision of the Superintending Engineer, it seems to us, is in the nature of considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. In our opinion the question regarding the amount of compensation leviable under clause 2 has to be decided only by the Superintending Engineer and no one else".***

In the present case there is nothing on record that in fact decision has been taken by the Superintending Engineer for imposition of compensation under cluse-2 objectively after taking into consideration the stand of the Engineer-in-charge as well as of the plaintiff.

The net result of the above discussion is that Rs.3,23,236/- compensation imposed vide letter dated 3.8.1992 Ex,.PW-2/L is in violation of **clause-2** of the agreement. The learned District Judge has appreciated the material on record in right perspective. The defendants have failed to make out any case for interference.

In view of above discussion, the appeal is dismissed. Impugned judgment and decree are upheld with costs.

(Kuldip Singh)
Judge

May 21 , 2007
(sks)